No. 83-1444

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners,

—against—

EXXON CORPORATION, ET AL.,
Respondents.

IN RE MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents' Brief in Opposition ("Br. Opp.") states that petitioners are seeking "an absolute ruling that non-party Fifth Amendment pleas are never admissible in a civil action" (p. 8).[1] Rather inconsistently, respondents on the same page assert that "petitioners never sought such a ruling" from the courts

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1 Respondents' overstatement of petitioners' position is a fair description of the intended effect of proposed Rule 513, which was adopted by this Court in 1972 by a vote of eight to one (*see* Petition for a Writ of Certiorari, hereinafter "Petition" pp. 11-12, 25).

below (p. 9 n. 7) and that those courts "refused to so hold" (p. 9). What petitioners have sought and are seeking (and what the magistrate granted, the district court denied, and the court of appeals refused to consider) is a ruling that, in the absence of connivance by a party, Fifth Amendment assertions by non-party employees (and former employees) acting on the advice of independent counsel are inadmissible as evidence of the "facts" asserted in the questions put to them.[2]

The issue thus presented is not, as respondents' principal argument assumes, an "abstract question [posed] in a factual vacuum" (Br. Opp. p. 8). The district judge presiding over these cases *sua sponte* invited the parties to move *in limine* with respect to the admissibility of the Fifth Amendment assertions in depositions to be offered at trial. Thereafter, the parties developed a complete factual record on all aspects of the motion, including specific questions posed to the witnesses at their depositions (with the foreknowledge that they would assert their Fifth Amendment privilege) and the use plaintiffs intend to make of this "testimony" at trial (*see, e.g.*, Petition p. 4). Each of the witnesses involved is a non-party. Many of them had long since ceased to be employees; several have since died; others reside beyond the district court's subpoena power.

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2 At every level, and again in this Court, respondents have alleged that petitioners "have encouraged their employees *not* to testify" (Br. Opp. p. 4). In the trial court, petitioners disproved this unsupported allegation by a factual showing (including affidavits from counsel for the witnesses) which has never been contradicted by any witness or document. Accordingly, the magistrate rejected plaintiffs' contention; the district judge stated at the argument that it is "not an issue" (transcript of 10/5/83 hearing before Judge Sear at 73); and the court of appeals wrote: "each of [the individuals asserting the privilege] acted on the advice of his own independent counsel" (Petition p. 3A). Similarly, respondents' claim that petitioners encouraged certain employees not to testify in another proceeding before a Louisiana licensing board was raised and rejected below. There were no Fifth Amendment claims in the board proceeding and the record below includes uncontested affidavits from counsel for those employees contradicting the charge of employer influence.

Their depositions are now completed, and none of them intends to waive the privilege and testify. Thus, most (if not all) of them will be wholly unavailable at trial.

In short, it is quite clear that these depositions will be offered at trial, that the issue then will be the same as that presented to this Court now, and that the record then will be exactly what it is now. We therefore submit that the district court was correct in certifying the question as ripe for appellate review on this record at this time. The trial is scheduled to commence next year. If it is a consolidated trial, it could well consume more than a year; even a more expeditious alternative (such as trial by geographic area or a single "bellwether" case), will probably take in excess of six months. Only the grant of this petition can avoid the monumental waste of judicial and private resources that will result if the rulings below are incorrect.

Respondents do not challenge this, but urge that the ruling below is correct and consistent with "*all* of the relevant precedents" (Br. Opp. p. 9). This too is demonstrably untrue.[3] It ignores this Court's repeated condemnation of "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" as well as its warning that "the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as

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3 *See, e.g., Farace* v. *Independent Fire Insurance Co.*, 699 F.2d 204 (5th Cir. 1983); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 454 n.7 (2d Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *United States* v. *5 Cases, More or Less, Containing "Figlia Mia Brand"*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950); *Rockwood Computer Corp.* v. *Morris*, 94 F.R.D. 64 (E.D.N.Y. 1982). *See also Depew* v. *Hanover Insurance Co.*, 73 F.R.D. 101, 103 (E.D. Tenn. 1976) ("a person who claims his privilege against self-incrimination under the federal common-law is entitled to an instruction that such exercise permits no adverse inference . . . ."); *Paynes* v. *Lee*, 362 F. Supp. 797, 800 (M.D.La. 1973), *aff'd per curiam*, 487 F.2d 1307 (5th Cir. 1974) ("[c]ertainly no inference adverse to the defendant could be drawn from his having followed this advice [of his attorney to invoke his Fifth Amendment privilege].").

equivalent either to a confession of guilt or a conclusive presumption of perjury."[4]

The policy considerations against permitting such an inference of guilt are so strong that even a defendant accused of murder was not permitted to attempt to establish his innocence by using the assertion of the privilege by the non-party witness whom he claimed (with some evidence) to have been the perpetrator of the crime. In *Bowles* v. *United States*, 439 F.2d 536 (D.C. Cir. 1970) (en banc), *cert. denied*, 401 U.S. 995 (1971), the court so held for the following reasons:

> "The jury may think it high courtroom drama of probative significance when a witness 'takes the Fifth.' In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination." 439 F.2d at 541-42.[5]

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4 *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557 (1956). *See also Ullmann* v. *United States*, 350 U.S. 422, 426-27 (1956) (hailing the privilege as "one of the great landmarks in man's struggle to make himself civilized."): *See generally Minnesota* v. *Murphy*, 104 S.Ct. 1136, (1984); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70, 81 (1973); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 283-84 (1968); *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493, 499 (1967); *Spevak* v. *Klein*, 385 U.S. 511, 515 (1967).

5 *Accord United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975) ("[t]he trial court did not err in refusing to permit the informant to be called to the stand [at defendant's request] and thus be compelled to invoke his Fifth Amendment rights in the presence of the jury."); *United States* v. *Lacouture* 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974) (the "probative force [of the invocation of the privilege] is weak and it cannot be tested by cross-examination."); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) ("[N]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.").

Our petition relied on this Court's decision last Term in *Pillsbury Co.* v. *Conboy*, 103 S. Ct. 608, refusing to compel testimony by a former employee of an antitrust defendant who, asserting his Fifth Amendment privilege, would not acknowledge his immunized grand jury testimony. We pointed out that the Court concluded that (even if a limited acknowledgement were compelled), because the witness could lawfully assert the privilege to any question which did more than ask him to affirm that he gave the prior testimony, the deposition would not be subject to cross-examination and would therefore be inadmissible. *Id.* at 615-16. Respondents' Brief in Opposition does not even attempt to address the denial of cross-examination which their position necessarily entails.

With the exception of the split decision in *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983), the cases on which respondents rely do not contain any extended analysis of the propriety of introducing Fifth Amendment claims or the resulting deprivation of cross-examination.[6] Although that case is distinguishable on its facts (*e.g.* the convictions of the Brink's employees of the crimes about which they refused to testify having been previously admitted without objection) the *Brink's* opinions dramatically present the competing points of view on these issues. We urge the Court to consider the carefully reasoned dissent of Judge Winter, in which he concluded that the result reached by the majority was "utterly without precedent in American law" (717 F.2d at 717). Such a diametrically opposed and vigorous expression of views on so vital an issue by such respected jurists underscores the need for review by this Court at the earliest opportunity.

And, aside from *Brink's* and *Carter-Wallace, Inc.* v. *Hartz Mountain Industries, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,332

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6 Given the case's special factual setting, it is unclear whether the majority in *Brink's* intended to overrule the Second Circuit's prior holding in *Brenner* v. *World Boxing Council*, *supra*, 675 F.2d at 454 n.7, that no adverse inference may be permitted from a Fifth Amendment invocation by a witness, even an alleged co-conspirator.

(S.D.N.Y. 1983), which simply followed *Brink's*, none of the cases cited by respondents permitted the use of Fifth Amendment invocations by non-party witnesses in a jury trial as evidence of the specific facts asserted in the question posed. Most of respondents' "authorities" involved assertions of the privilege by *parties*.[7] *See, e.g., National Acceptance Co. of America* v. *Bathalter*, 705 F.2d 924 (7th Cir. 1983); *McKinney* v. *Galvin*, 701 F.2d 584 (6th Cir. 1983); *Wehling* v. *Columbia Broadcasting System*; 611 F.2d 1026 (5th Cir. 1980) (per curiam); *SEC* v. *Musella*, 578 F.Supp. 425 (S.D.N.Y. 1984); *see also Compass Insurance Co.* v. *Acella Chrysler-Plymouth, Inc.*, No. 80 Civ. 5608 (HFW) (S.D.N.Y. July 25, 1983), where the court emphasized that *Baxter*[8] applied only to a *party's* refusal to testify but concluded that the sole shareholder of the defendant corporation could not be characterized as a non-party witness. The remaining cases cited by respondents are district court opinions of doubtful validity.[9]

Finally, respondents conclude by asserting (Br. Opp. p. 13) that petitioners could, if they "chose", testify at the trial "through the testimony of the Fifth Amendment witnesses."[10] This argument illustrates the ultimate vice in respondents'

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7 A *party* who invokes the privilege may be able to "explain and control the contours of his invocation", *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d 237, 246 (3d Cir. 1983) (Stern, J., dissenting) but a party cannot explain or cross-examine an invocation by a non-party witness. Respondents' attempt to equate the ambiguous and unexaminable assertion of the privilege with *testimony* by a non-party employee (Br. Opp. p. 13) is patently spurious.

8 *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

9 *E.g., E.H. Boerth Co.* v. *LAD Properties*, 82 F.R.D. 635 (D. Minn. 1979), permitted an adverse inference against the corporate defendant which employed the invoking witness, while at the same time precluding such an inference against the individual defendant who was the sole owner and general partner of the respective companies (*id.* at 645).

10 The expression "Fifth Amendment witnesses", used repeatedly in Respondents' brief, is reminiscent of the "Fifth Amendment Commie" assumption of probative value (Petition p. 10 n. 9).

position, for it suggests that petitioners can and should force their employees and former employees to waive their privilege and testify. Indeed, respondents condemn petitioners for having "done nothing to encourage testimony by their present and former employees" (Br. Opp. p. 4). Contrary to respondents' suggestion, we submit that it would be highly improper for an employer to attempt to coerce persons who are or have been its employees into giving up their constitutional privilege. Yet the ruling below will foster such coercion (covert or otherwise) if it is permitted to stand.

CONCLUSION

Opinions from the Courts of Appeals for the Second, Third and Fifth Circuits have expressed conflicting views on the merits of the critical question presented for review. No legitimate interest would be served by refusing to resolve this important issue in the context of these cases, where refusal will undoubtedly mean retrials of mammoth proportions. To avoid that result, a writ of certiorari is required now.

Respectfully submitted,

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